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AUG 15 1985
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No. 85-171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUIS FRANK UGARTE,

Petitioner,

—vs.—

UNITED STATES LINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does this case warrant the sparing exercise of the Court's extraordinary certiorari jurisdiction where the judgment of the New York Court of Appeals was based on its rules of procedure allocating the burden of proof for summary judgment which were applied properly to Federal precedent governing the Jones Act?

2. Should the General Maritime Law's warranty of seaworthiness be extended to pier areas where the shipowner has no control?

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STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

UNITED STATES LINES, INC. is a wholly-owned subsidiary of McLean Securities, Inc. The latter is traded publicly on the New York Stock Exchange and approximately 90% of its shares is owned by Malcolm P. McLean.

IN THE

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OCTOBER TERM, 1985

No. 85-171

LUIS FRANK UGARTE,

Petitioner,

—VS.—

UNITED STATES LINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's version is basically accurate with several important exceptions.

There is no mention of the initial court's 8A Order which is similar to a pre-trial order in the United States District Courts pursuant to Federal Rule of Civil Procedure 16. The State authority for this rule at the trial level court is McKinney's 1982 New York Rules of Court § 660.35 (22 NYCRR 660.35), effective May 26, 1981, and is reprinted in respondent's portion of the appendix beginning at page 42a.

The relevant portion of the order is on page 45a, wherein discovery was to be completed by a certain date (no extensions were sought) and where the petitioner demonstrated his intention of deposing only seamen-witnesses, not respondent's personnel. This "8A Order" was part of the Record on Appeal which was filed with both New York appellate courts.

The petition also implies that the subject railroad cars magically appeared on the Bremerhaven dock after petitioner left the vessel at 6:30 P.M. and before his return at around 10:00 P.M. This contradicts the affidavit submitted below [35a] where Mr. Ugarte states that the vessel had been docked at that location for a complete day before his excursion.

More importantly, counsel neglects to inform the Court that Mr. Ugarte and a companion were drinking in the Bremerhaven Seamen's Club before their return to the vessel from shore leave. See the attached pages from plaintiff's Examination Before Trial, or Deposition, printed as part of the Appendix, 48-49a, which were part of respondent's original motion. Although he limits his consumption to only two beers in 3 hours, Mr. Ugarte does admit to half an hour of shopping at a later time when normal retailing would not occur.

SUMMARY OF ARGUMENT

Respondent, UNITED STATES LINES, INC., (USL) respectfully submits that the instant petition fails to present a single "special and important" reason warranting the issuance of a Writ of Certiorari. (See Supreme Court Rule 17.) On the contrary, the only real issue raised by the disposition below is whether the New York Court of Appeals correctly granted USL's motion for summary judgment because petitioner had failed to present sufficient admissible proof as to whether respondent violated any Jones Act duty.

Because that fact-bound determination presents no conflict with any decision of this Court or any Circuit, and because this Court's extraordinary certiorari jurisdiction is not properly invoked "to review evidence and discuss specific facts", the petition should be denied. See *United States* v. *Johnston,* 268 U.S. 220, 227 (1925).

In his Point II, petitioner takes about two pages to argue that the warranty of seaworthiness should be extended landward over pier areas beyond the gangway and that this is a

"re-occurring and most important issue . . . not yet addressed by this Court." The brevity of argument and dearth of authority are understandable in light of this Court's decision in *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971) which distinguished and re-affirmed *Guttierez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963) by limiting admiralty law to the end of the gangway except in unique circumstances not present in the case at bar.

ARGUMENT AND REASONS FOR DENYING THE WRIT

A. Petitioner failed to sustain his burden of proof according to State Procedure.

Stripped to its essentials, petitioner's argument is that a factual issue was created solely by Mr. Ugarte's affidavit, [35a]. This issue was the main contention in the motion for re-hearing, [21a-24a]. Deficiencies are claimed because USL personnel did not submit an affidavit and that issues were raised by respondent's counsel instead. Unfortunately, the procedural ground rules leading to the dismissal below have been misinterpreted.

Before considering whether a plaintiff puts forth sufficient proof to defeat a defendant's motion for summary judgment, the issue of whether the defendant established a defense must be addressed, *Zuckerman* v. *City of New York*, 49 N.Y. 2d 557, 562, 427 N.Y.S. 2d 595, 404 N.E. 2d 718 (1980). In this instance, USL put forth sufficient evidence in admissible form and petitioner raised no issue of material fact to support his claim of negligence or unseaworthiness. Merely because defendant's supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony rather than affidavits of fact on personal knowledge, does not defeat defendant's right to summary judgment. See *Gaeta* v. *New York News*, 62 N.Y. 2d 340, 350, 477 N.Y.S. 2d 82, 465 N.E. 2d 802 (1984), and *Zuckerman* v. *City of New York*, supra, page 563.

Supporting affidavits will be scrutinized with care and purely conclusory assertions will not and did not assist petitioner, see *Columbia Ribbon* v. *A-1-A Corp.*, 42 N.Y. 2d 496, 500, 398 N.Y.S. 2d 1004, 369 N.E. 2d 4 (1977) and *Indig* v. *Finkelstein*, 23 N.Y. 2d 728, 296 N.Y.S. 2d 370, 244 N.E. 2d 298 (1968), as well as *Friends of Animals, Inc.* v. *Associated Fur Manufacturers, Inc.*, 46 N.Y. 2d 1065, 1067, 416 N.Y.S. 2d 790, 390 N.E. 2d 298 (1979).

The substance and timing of petitioner's affidavit should be examined. He there states: "It is my claim that United States Lines or its agent including the pier owner or operator . . ." [36a]. This recitation comes after plaintiff had over 3 months to conduct whatever disclosure he felt was needed to prove the agency relationship. According to the 8A—Pre-Calendar Order [46a], petitioner did not even want to depose any of respondent's personnel. Mr. Ugarte's failure to employ discovery procedures cannot be held against respondent even if the relevant facts are solely within its knowledge, see *Roche* v. *Hearst Corp.*, 53 N.Y. 2d 767, 439 N.Y.S. 2d 348, 421 N.E. 2d 840 (1981).

Counsel for petitioner's August 2nd, 1983 letter [27a] is also woefully deficient. This correspondance seeks to re-open discovery almost 6 months after the service of respondent's motion papers and 5 months after Mr. Ugarte's conclusory affidavit enumerated his theories of liability.

The text of this August 2, 1983 letter to the initial court, while the motion was *sub judice* and after the close of discovery, is also interesting. Mr. Katz states: "We have recently learned that United States Lines, Inc. is charged with the maintenance[1] of the German pier at which its vessel was docked at the time Mr. Ugarte was caused to sustain his injury." The source of this knowledge is curiously never identified. An attorney's hearsay speculation was rightly ignored, see *Zuckerman* v. *City of New York*, *supra*.

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1 Since the alleged cause of the accident was the positioning of railroad cars, it is difficult to see the relevance or even materiality of this statement.

Petitioner thus made three presentations to the New York Courts over a two-year period without ever offering any specific information justifying further inquiry. Mr. Ugarte's affidavit was sworn to on March 3, 1983; his counsel's *sub judice* letter was in August, 1983, while the plea for further discovery before New York's highest Court in the form of a motion for re-hearing was on March 14, 1985, [21a-24a]. A leading New York procedural treatise, 4 Weinstein-Korn-Miller, *New York Civil Practice*, states at page 51: "CPLR 3212(f) [the alternative basis for petitioner's rehearing] should not be used as a means of embarking on a 'fishing expedition' ".

B. Jones Act precedent was properly followed by the New York Court.

Epling v. *M. Transport Epling Co.*, 435 F. 2d 732, 736, (6th Cir.), *cert. den.* 401 U.S. 961 (1973), is an example:

> " . . . Even the sweeping non-delegable duty imposed by the Jones Act upon the employer to provide his employees with a safe place to work will permit the imputation of a third-party's negligence to the employer only where there has been a breach of some contractual duty owed by the third party to the employer."

A recent Federal Employers' Liability Act (FELA) case from the Second Circuit has a similar holding, see *Thomas* v. *Grigorescu*, 582 F. Supp. 514 (SDNY) affirmed 751 F. 2d 371 (1984). Former maritime attorney, and now Judge Haight, there found that the *Hopson* v. *Texaco*, 382 U.S. 262 (1966) and *Sinkler* v. *Missouri Pacific*, 374 U.S. 326 (1958) line of cases could only be invoked if definite proof of a specific contract between an independent contractor and the railroad or the shipowner is established. Absent such proof, FELA or Jones Act duty, "extends only to those areas over which the defendant or its agents exercise control", 582 F. Supp. at 518. See also *Verrett* v. *McDonough Marine*, 705 F. 2d 1437 (5th Cir., 1983).

Petitioner's use of precedent leaves something to be desired. He cites a series of cases [Petition, bottom of p. 8, top of p. 9], which do not lend much support to his cause. *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 736-737 (1944) was a maintenance and cure case which in *dicta* implied that a shipowner would not be liable for a pier operator's negligence, *Hamilton* v. *Marine Carriers Corp.*, 332 F. 2d 223 (ED Pa. 1971) was resoundingly rejected by the Ninth Circuit in *Bates* v. *Prudential-Grace Lines,* 497 F. 2d 900, *cert. den.* 419 U.S. 1009 (1974).

Counsel's *Aguilar* and *Hamilton* string ends with *Chesapeake & Ohio R.R.* v. *Newman*, 243 F. 2d 804 (6th Cir., 1957). This case is so easily distinguishable that its citation is almost misleading. In *Newman*, the shipowner and the railroad were the same entity and owned 90 acres of pier area. The plaintiff proved a custom and practice concerning certain overlapping duties between the ship and the shoreside employees of the involved facility. Finally, the accident occurred on a well-utilized path linking the ship with its marine office.

Merely because common elements of marine transportation such as railroads and piers are involved does not add anything. The Ninth Circuit dismissed a seaman's complaint in *Tim* v. *American President Lines*, 409 F. 2d 385 (1969), where serious injury occurred during the discharging or unloading of defendant's vessel and was caused by the stevedore's gantry crane operator. Plaintiff there also failed to prove the specific operational control or agency necessary to impose *Sinkler* or *Hopson* liability, 409 F. 2d at 388.

A large portion of the petition urges that longstanding Jones Act precedent has impliedly been overruled by two FELA cases, *Carter* v. *Union R.R. Co.*, 438 F. 2d 208 (3rd Cir., 1971) and *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. (1963). This exact argument was rejected by the lower court in *Bates* v. *Prudential-Grace Lines*, 357 F. Supp. 774, 777:

> "Although I recognize that this conclusion [of *Hamilton*] has some merit, I cannot give it great weight.

> First, I cannot conclude that either *Carter* or *Shenker* was intended to abrogate such a well-established rule . . ."[2]

[*Bates* was affirmed by the Ninth Circuit, 497 F. 2d 900, *cert. den.* 419 U.S. 1009 (1974).]

While the railroad workers' FELA and the seamen's Jones Act can judicially intersect, logistical considerations and operational reality preclude the transformation of a "landlubber" into a "seafarer". Respondent is not a property owner but is a vessel owner. A ship cannot choose its docking berth at a particular port. The local port authority will make that selection. Once assigned a berth, it must rely on the dock operator or owner. Various ancillary independent contractors, such as a railroad, become involved once a vessel begins to load or discharge. After mooring at a particular berth, the ship may be shifted to another location for a myriad of reasons and with short notice.

Furthermore, the AMERICAN COURIER was chartered to the U.S. Navy's Military Sealift Command which dictated her itinerary and schedules. See *Tim* v. *American President Lines, supra,* where the stevedore was also hired by the U.S. Government to handle its cargo so that it was an intervening entity precluding a direct link with the shipowner. Under those circumstances there was no Jones Act duty.

Petitioner's theories of failure to warn and inadequate lighting from the ship can also be eliminated. Mr. Ugarte knew of the possible configuration of shoreside equipment in Bremerhaven, and that he would be returning at night after shore leave [36a]. USL's knowledge was no greater. *Martinez* v. *Matson Navigation Company, et al.*, 1963 AMC 1188 (S.D. Ga. 1963), dealt with a similar accusation of a failure to warn:[3]

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2 A leading treatise, 1B Hall-Saun-Bellman, *Benedict on Admiralty* [7th rev. ed.] § 29, p. 3-208, n. 21 further faults *Hamilton* for failing to consider the unique nature of shore leave—a feature of employment unknown to railroad workers.

3 This unofficial citation is quoted in its entirety and discussed in 1B, *Benedict on Admiralty, supra,* § 29, n. 21, p. 3-203. It also states, "when a seamen passing across the pier suffers injury by his own act, in no event does

> "The conditions which produced the libellant's [plaintiff's] injuries were as apparent to him before his accident as they might have been to the shipowner. There was no reason why the libellant, upon discovering the darkened condition of the pier, could not have returned to the ship and secured a flashlight or asked the master for assistance."

Plaintiff and his companion successfully negotiated the route from the ship to their libations at the Seamen's Club. Mr. De Oliveria also returned safely. Ignoring the premise that the proximate cause of the accident was the God-created rain which fell after sunset [testimony at 49a], whatever difficulties remained could have been easily conquered by the far-from-cumbersome, hand-held flashlight. See also *Wheeler* v. *West Indian S.S. Co.*, 205 F. 2d 354 (2nd Cir., 1954).

Petitioner has offered no conflict in the Circuits or any compelling reason to disregard longstanding precedent. This Court should reject his invitation to unnecessarily overrule a valid doctrine of admiralty, that there is no Jones Act duty owed to a shore-leave seaman beyond the end of the gangway, see cases referred to in 1B Benedict, supra, § 29, n.21 .

C. Extension of the warranty of seaworthiness to the pier is not only inappropriate but precluded by precede[illegible]

In *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (19[illegible], this Court settled the issue of the shipowner's liability for unseaworthiness where the injury occurs beyond the end of the gangplank. There is none unless the instrumentality causing the injury was in some way attached to the ship or under the control of the ship or its crew. For the same reason that the Jones Act claim fails for lack of proof as to the shipowner's control, a pursuit of an unseaworthiness theory would be equally futile.

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the shipowner owe the seaman any great duty of care", p. 3-197, n. 17. See also cases cited pp. 3-200 through 3-208, n. 21.

Victory Carriers distinguished and reaffirmed the holding of *Gutierrez* v. *Waterman Steamship*, 373 U.S. 206 (1963), upon which petitioner relies. This Court noted that a maritime "function" such as stevedoring, which was being performed at a time of the injury in *Law*, was not crucial. The key fact in *Gutierrez* was that the injury was caused by an appurtenance of a ship, defective cargo containers, and occurred ashore so that the necessary ingredients for imposing liability under 46 U.S.C. § 740 were present, 440 U.S. 210-211.

Using terminology applicable to this Petition, *Victory Carriers* stated:

> "Respondent Law was not injured by equipment which was part of the ship's usual gear which was stored on board, the equipment which injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew and the accident did not occur aboard ship or on the gangplank. Affirmance of this decision below would raise a host of new problems as to the standards for and limitations of the applicability of maritime law to accidents on land. At least in the absence of explicit Congressional authorization, we shall not extend the historic boundaries of maritime law". 404 U.S. 213-214.

The principles of *Gutierrez* and *Victory Carriers* have been followed by the courts in seamen's personal injury litigation. See *Henry* v. *S.S. MT. EVANS*, 227 F. Supp. 408 (D. Md. 1964) and other cases cited in *1B-Benedict on Admiralty*, § 29 pp. 3-198 to 3-200, n. 18. None involves a shore leave situation which would be an inappropriate vehicle to change settled rules and where the Jones Act limits liability to the end of the gangway.

The only Appellate Court decision located which somewhat extended *Gutierrez* to a pier area is *Jeter* v. *Starfish and Oyster Co.*, 482 F. 2d 457, 458 (5th Cir., 1973). There the captain of a fishing boat slipped on fish slime as he walked on the pier

while fish were being unloaded. The court failed to hold the vessel unseaworthy, but found the defendant negligent in failing to clean the fish properly. The pier was actually owned by the same entity that owned the fishing boat and it had a vice president on the scene. It is thus similar to *Chesapeake & Ohio R.R.* v. *Newman, supra*, and distinguishable on the same grounds.

Petitioner cites *Romero Reyes* v. *Marine Enterprises, Inc.*, 494 F. 2d 866 (1st Cir. 1974), which actually is against him if read closely. It upheld the rule that the gangplank line is the presumptive boundary of admiralty jurisdiction. The First Circuit would not let the ship dodge its responsibility merely because this key appurtenance was owned by another entity.

CONCLUSION

This case is of no importance beyond the immediate parties. The New York Court of Appeals correctly applied its own procedural laws and controlling Federal precedent by granting respondent's Motion for Summary Judgment. Any extension of the doctrine of unseaworthiness to areas of the pier uncontrolled by the shipowner is not warranted based on the facts of this case.

Dated: New York, New York
August 9, 1985

Respectfully submitted,

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APPENDIX

Text of Court Rule Forming Basis for 8A Order

§ 660.35. Mandatory Pre-Calendar Conferences: Applicable in New York County in Actions for Personal Injury or Wrongful Death in Which City of New York is Not a Party

(a) In all actions for personal injury or wrongful death, except actions in which the City of New York is a party, a precalendar conference shall be conducted before the note of issue is filed.

(b) Within sixty days after joinder of issue, the plaintiff shall serve on all parties who have appeared in the action a notice of pre-calendar conference to be held in Special Term, Part 8-A. Such notice, with proof of service upon all such parties, bearing an index number, and substantially in the form available in the calendar clerk's office, shall be filed by the plaintiff with the calendar clerk within five business days after service, and the calendar clerk shall place the action on a conference calendar.

(c)(1) The matters to be considered at the conference shall include:

(i) settlement of the action;

(ii) simplification and limitation of issues, where appropriate;

(iii) establishment of a timetable for the completion of all discovery proceedings; and

(iv) the granting of a general or special preference or the remanding of the action to the Civil Court.

(2) Except where a party appears in the action *pro se*, an attorney thoroughly familiar with the action, and authorized to act on behalf of the party, shall represent such party at the conference. The plaintiff shall submit at the conference a copy

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of the bill of particulars, if one was demanded, with proof of service upon all parties who have appeared in the action. If no bill of particulars has been demanded before the scheduling of the precalendar conference, the plaintiff nevertheless shall submit at such conference a bill of particulars containing the information specified in CPLR 3043(a), together with proof of service.

(d) At the conclusion of the conference the court shall render a written order, including its directions to the parties as well as stipulations of counsel. Alternatively, in the court's discretion, all directions of the court and stipulations of counsel may be recorded by a reporter. Where the latter procedure is followed, the parties shall procure and equally pay for a certified transcript thereof. The transcript, corrected if necessary on motion or by stipulation of the parties approved by the court, shall have the force and effect of an order of the court. The transcript shall be filed by the plaintiff with the clerk of the court.

(e) Continuation of a preference shall be conditional upon full compliance with the foregoing order or transcript. When a note of issue and certificate of readiness are filed in an action to which this section is applicable, the filing party, in addition to complying with all other applicable rules of the court, shall file with the note of issue and certificate of readiness a copy of the precalendar conference order or transcript and an affirmation or affidavit, with proof of service on all parties who have appeared, showing specific compliance with such order or transcript. In the discretion of the court, failure by a party to comply with the order or transcript, or the making of unnecessary or frivolous motions by a party, shall result in the imposition upon such party of costs or such other sanctions as are authorized by law.

(f) A motion in an action to which this section is applicable shall be made as follows:

(1) Motions that are made before the note of issue and certificate of readiness are filed, or that relate to an order

or transcript that has been rendered at a precalendar conference, shall be returnable at Special Term, Part 8—A, except as provided below.

(2) Motions in such actions in which a note of issue and certificate of readiness have been filed, but where the action has not been assigned to a conference and assignment or trial part, shall be made returnable in Special Term, Part 1 or 1—A, as appropriate, in the same manner as motions in actions to which the requirement of a precalendar conference under this section does not apply.

(3) Motions to dismiss or for summary judgment pursuant to CPLR 3211 or 3212, made before service of a precalendar conference notice, shall be returnable in Special Term, Part 1.

(4) Motions for disclosure pursuant to CPLR article 31, made before service of a complaint, or motions pursuant to CPLR 3042, or any other motions relating to a bill of particulars, made before service of a precalendar conference notice, shall be returnable in Special Term, Part 1—A.

(5) Motions to remove an action or proceeding from another court or for consolidation or severance, made before service of a precalendar conference notice, shall be returnable at Special Term, Part 1.

(6) Motions to dismiss for lack of prosecution where the plaintiff has not filed a precalendar conference notice shall be returnable at Special Term, Part 1.

(g) Motions for disclosure or other relief in actions to which this section is applicable, made after the bill of particulars has been served or after notice of precalendar conference has been filed, but before the precalendar conference is held, may be denied unless there is shown good cause why such relief is warranted before the required precalendar conference.

(h) A party may move to advance the date of a precalendar conference upon a showing of special circumstances.

8A Order

PRE-CALENDAR CONFERENCE ORDER
PURSUANT TO 22 NYCRR 660.35 EFFECTIVE MAY 26, 1981

SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM PART 8A

Index Number 06143/79

Conference Number H 11938

Conference Date 10/28/82

LUIS UGARTE,

Plaintiff(s),

against

UNITED STATES LINES, INC.,

Defendant(s).

APPEARANCES:

Plaintiff(s) Neil Tolkiss
PHILLIPS & CAPPIELLO

Defendant(s) K.C. Hildebrandt
KIRLIN CAMPBELL & KEATING

I. INSURANCE COVERAGE:

☐ If not furnished, Plaintiff to be advised in
☐ Writing by

II. BILL OF PARTICULARS:

☐ 1. Not submitted: Action marked off calendar, or
☐ 2(A). Submitted: Satisfactory
☐ 2(B). Unsatisfactory
☐ 3. Supplemental Bill of Particulars to be served
☐ 4. Bill of Particulars for affirmative defenses to be served

III. MEDICAL REPORTS AND HOSPITAL AUTHORIZATIONS

☒ 1. Furnished (Except:
☐ 2. Medical reports or authorizations for records to be served
☐ 3. Hospital authorizations to be served

IV. PHYSICAL EXAMINATION: (Other Than Transit)

☒ 1(A). Held ☐ 1(B). Waived
☐ 1(C). Examination of _____ to be held _____
☐ 2(A). Physicians's report furnished
☒ 2(B). Copy of physician's report to be furnished to plaintiff within 60 days of examination

V. EXAMINATION BEFORE TRIAL:

☐ 1. Plaintiff ☐ Defendants ☐ All Parties
☒ 2. To be Held *Seamen witnesses by Jan. 31, 1983*[4]
☐ 3. Held (Except: _____) ☐ Waived

VI. OTHER DISCLOSURE:

☐ 1. None
☐ 2. All parties to exchange names and addresses of all witnesses, opposing parties statements and photographs. If none, an affirmation to that effect shall be exchanged.
☐ 3. Authorizations for plaintiff(s) employment records (IRS) including W-2 for period _____
☐ 4. _____
☐ 5. To be completed *Jan. 31, 1983*[4]

VII. IMPLEADER ACTIONS:

☐ 1. (A) None 1 (B) To be commenced

VIII. PREFERENCES:

☒ 1. (A) General preference granted
☐ 1. (B) Denied
☐ 2. Medical malpractice action: General preference not considered.

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4 These italicized phrases were added to the standard form by counsel at the October 25, 1982 pre-trial conference.

☐ 3. General preference not determined pending further application after compliance with ___
☐ 4. (A) 325 (C) CPLR ☐ 4. (B) 325(D)
☐ 5. (A) 3403 (A)____ CPLR granted
☐ 5. (B) 3403 (A)____ denied
☐ 5. (C) 3403 (A)____CPLR held in abeyance pending further application/motion

IX. ADDITIONAL DIRECTIVES:

☐ 1. Court reporters minutes incorporated in order
☐ 2. See attached page for additional directives
☐ 3. None

X. _____

Is directed to file a Note of Issue and Certificate of Readiness on or Before *29 April 83*

XI. WHEN FILING THE NOTE OF ISSUE AND CERTIFICATE OF READINESS THE FILING PARTY SHALL SERVE A COPY OF THIS ORDER, TOGETHER WITH AN AFFIRMATION STATING COMPLIANCE WITH ALL DIRECTIVES OF THIS ORDER AND AN AFFIDAVIT OF SERVICE ON THE CALENDAR CLERK AND ALL PARTIES. IN THE EVENT OF NON-COMPLIANCE, COSTS OR OTHER SANCTIONS MAY BE IMPOSED.

THIS CONSTITUES THE DECISION AND ORDER OF THE COURT.

Dated: 10/25/82

Enter:

/s/ [Alfred Ascione]
J.S.C.

ALL DATES CONTAINED HEREIN RELATING TO THE COMPLETION OF ITEMS IN THIS ORDER **MUST** BE ADHERED TO. COUNSEL MAY NOT ENTER INTO ANY ADJOURNMENTS WITHOUT FURTHER ORDER OF THIS COURT.

Excerpts from Original Motion Papers

claiming a breach of the warranty of unseaworthiness under the General Maritime law for injuries allegedly sustained on May 24, 1978, when defendant's ship, the S.S. AMERICAN COURIER, was berthed at Bremerhaven, Germany, on May 24, 1978.

3. Even though this maritime action has been instituted in State Court, Federal Maritime law governs and this Court's sole responsibility is to determine the applicable Federal law, *Alvez v. American Export*, 46 N.Y. 2d 634.

4. It is clear from plaintiff's testimony in his examination before trial that he was injured while returning to the vessel from shore leave as he fell in between two railroad cars in an area not under the defendant's control. This can be shown in the following excerpts:

EBT—Page 7.

"Q. Where did you have the accident?

A. I had the accident coming back from shore, as I was trying to go between the cars. I climbed on a platform and fell. The place was wet and slippery on account of the rain.

Q. What time did you go ashore?

A. I went ashore between about 6:30 and 7:00 P.M.

EBT—Pages 12-13.

Q. Now, on the dock alongside which the ship was tied up, were there any railroad tracks?

A. Yes.

Q. Do you remember how many?

A. There were boxcars there, they were a long way from one end to the other. So the safest way to go to the ship was to walk to the left, to walk around the cars to get to the gangway.

Q. Let's put it this way, from the gangway to the closest railroad car what was the distance about?

A. I would say, from here to the wall, that would be the gangway. I don't know how far it would be.

Q. 10 feet, approximately?

A. Yes I know it's near that.

EBT—Pages 16-17.

Q. Before you got to the railroad cars, did you walk up onto a loading platform and jump off that loading platform, on the ground?

A. I remember climbing between the cars, between the boxcars and standing on a platform. Then I slipped and fell. I fell because of the rain, it was slippery. It was wet and slippery."

5. It is also clear from the same testimony that plaintiff was on shore leave conducting personal affairs unrelated to the ship's business:

EBT—Pages 22-23.

Q. When you first went ashore that evening with Mr. DeOliveria, you say you went to the Seamen's Club. Did you have anything to drink there?

A. Yes, I had two beers.

Q. You say you left the Seamen's Club?

A. Yes.

Q. About what time did you leave the Seamen's Club?

A. About 9:00 o'clock, 9:30, something like that. It may have been 10:00 o'clock, then we got back to the ship.

Q. After you left the Seamen's Club, did you go to any other bar in Bremerhaven?

A. No.

Q. Did you have anything else to drink after you left the Seamen's Club?

A. No.

Q. You say you went shopping after you left there?

A. Yes, then back to the ship."